

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-214869 DATE: December 26, 1984
MATTER OF: Coastal Striping & Painting Corp.

DIGEST:

1. In general, GAO will not question a negative determination of responsibility unless the protester can demonstrate bad faith on the agency's part, or a lack of any reasonable basis for the determination.
2. A showing of bad faith requires irrefutable proof that contracting officials acted with the specific and malicious intent to injure the protester.
3. The required listing of sufficient potential minority business enterprise subcontractors to satisfy an affirmative action participation goal, or documentation of a good faith effort to meet that goal, relates to the bidder's responsibility. The low bidder's failure to show that it will be able to meet, or has reasonably attempted to meet, that goal here is a sufficient basis for the agency's conclusion that the firm is not responsible in this area.
4. An agency's decision to cancel a solicitation because of changed conditions is not objectionable where the delay in proceeding to award clearly resulted from the bidder's failure to establish its responsibility.

Coastal Striping & Painting Corp., the low bidder, protests a determination by the District of Columbia (D.C.) Government that the firm is a nonresponsible bidder under invitation for bids (IFB) No. 0102-AA-02-0-4-KA. The procurement is for the application of thermoplastic pavement markings. Coastal also complains that the D.C. Government has now decided to cancel the solicitation without an adequate reason for doing so. We deny the protest.

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Two firms responded to the solicitation. Bids were opened on December 14, 1983, and Coastal was the apparent low bidder. However, the D.C. Government determined that Coastal is not a responsible contractor to perform the work on the following grounds:

- (1) lack of prior experience in applying thermoplastic pavement markings;
- (2) failure to establish the existence of a suitable agreement or arrangement with a minority business enterprise subcontractor to perform 25 percent of the dollar amount of the anticipated contract;
- (3) lack of adequate financial resources; and
- (4) lack of the necessary thermoplastic application equipment.

Coastal timely protested the D.C. Government's non-responsibility determination to this Office in April of 1984, and no award has been made. At the D.C. Government's request, we deferred any further action towards resolution of the matter because the D.C. Government had decided to afford Coastal an additional opportunity to furnish evidence of its responsibility. Although Coastal offered certain additional information in this regard, the D.C. Government was not satisfied by the firm's responses, and continues to maintain that the firm is nonresponsible. The D.C. Government now informs us that the solicitation has been canceled because the original contract performance period is set to expire on March 31, 1985, and no thermoplastic work can be done during the winter months.

The determination of an offeror's responsibility is the duty of the contracting agency, which, in making that determination, is vested with a wide degree of discretion and business judgment. Generally, we will not question a negative determination of responsibility unless the protester can demonstrate bad faith on the agency's part, or a lack of any reasonable basis for the determination. Amco Tool & Die Company, 62 Comp. Gen. 213 (1983), 83-1 CPD ¶ 246.

Coastal alleges that the D.C. Government has acted in bad faith in this matter because it mishandled or misplaced certain information forwarded by the firm to demonstrate its responsibility. However, a showing of bad faith requires irrefutable proof that contracting officials acted with the malicious and specific intent to injure the protester, Jack Roach Cadillac, Inc., B-210043, June 27, 1983, 83-2 CPD ¶ 25, a burden which Coastal has not met here.

From the record, it is clear that the D.C. Government has afforded Coastal several opportunities to furnish the requisite documentation to establish its responsibility, and the firm has been either unwilling or unable to do so. As late as the administrative bid protest conference convened in this matter on November 21, 1984, the D.C. Government stated that it was still prepared to accept further evidence from Coastal as to its responsibility, and, if this were satisfactory, to award it the contract. As we shall discuss more fully below, the firm has not furnished that evidence. Although it is apparent that certain materials forwarded by Coastal may have been mishandled or misplaced earlier, the D.C. Government has rectified the situation by affording Coastal these additional opportunities to establish its responsibility. On these facts, we cannot conclude that the D.C. Government has willfully sought to deny Coastal the contract. Jack Roach Cadillac, Inc., supra.

Coastal asserts that the D.C. Government has no reasonable basis for determining it to be nonresponsible. The firm states that it has sufficient prior experience in thermoplastic applications to perform the current work, and offers in evidence work orders from a prior pavement marking contract it performed showing the use of thermoplastic materials. The issue of the firm's prior experience was long in dispute, since the D.C. Government had earlier concluded that the prior contract in question involved painting only, and not the application of thermoplastic. Although the work orders seemingly refute that conclusion, we note that Coastal did not furnish this documentary evidence until the administrative conference mentioned earlier. In any event, the D.C. Government indicated at that conference that it would accept the work orders as some evidence of Coastal's experience in applying thermoplastic pavement markings, even though Coastal

admitted that the scope of the prior contract was much less than that of the current procurement. However, because of Coastal's failure to establish its responsibility in other areas, any confusion on this particular issue does not obviate the D.C. Government's negative determination.

Funding for the pavement marking work was to be furnished by the U.S. Department of Transportation (DOT), which requires that affirmative action goals be met through minority business enterprise (MBE) participation in any contracts awarded by the recipient of such financial assistance. See 49 C.F.R. part 23 (1983). Accordingly, the IFB provided that 25 percent of the dollar amount of the anticipated contract was to be performed by an MBE subcontractor. As part of its bid, Coastal submitted a written certification that it would meet this participation goal or make a reasonable effort to do so.

After bid opening, Coastal furnished the name of its proposed MBE subcontractor, but the D.C. Government determined that this particular firm did not in fact qualify as an MBE. It appears that the firm might have been qualified at the time Coastal approached it for a subcontracting agreement or arrangement, but that the minority controlling interest who gave the firm its MBE status has since sold her interest to non-minority partners. Coastal has been unable to demonstrate any suitable agreement or arrangement with another MBE subcontractor so as to meet the 25 percent participation goal. Coastal asserts that this is impossible due to the limited number of minority concerns involved in thermoplastic pavement marking work.

We have held that the required listing of sufficient potential MBE subcontractors to satisfy such a participation goal, or documentation of a good faith effort to meet that goal, relates to the bidder's responsibility.

A. Metz Inc., B-213518, Apr. 6, 1984, 84-1 CPD ¶ 386.

Here, after learning that the MBE subcontractor originally relied upon did not qualify, Coastal has failed to furnish clear documentation to the D.C. Government that it has either made, or will be able to make, a suitable agreement or arrangement with another MBE subcontractor, or even that it has made all reasonable efforts to do so. Although Coastal at one point indicated that it had found another qualified firm, the D.C. Government was informed

by this firm that it had no intention of working with Coastal on the pavement marking contract. Under these circumstances, we think that the D.C. Government properly concluded that Coastal has not demonstrated a sufficient good faith effort to meet the 25 percent participation goal.

The D.C. Government also determined that Coastal had failed to show that it had the necessary financial resources and thermoplastic application equipment to perform the project. With regard to financial resources, Coastal furnished a letter from its bank which indicated particular account balances and lines of credit, including one for \$125,000. The D.C. Government did not accept this as evidence of adequate financial resources, as it was felt that the language of the bank's letter could reasonably be interpreted to mean that the \$125,000 line of credit was based upon prior government contracts already assigned to the bank, and, therefore, that that amount was not presently available to Coastal for the pavement marking contract. Regardless of the exact meaning of the bank's letter, we note that it is dated some 4 months prior to the December 14, 1983 opening of bids. If the D.C. Government doubted the availability of the \$125,000 line of credit, a concern again raised at the administrative conference, we fail to see why Coastal could not have easily obtained a written clarification of the matter from the bank involved even at this point.

Similarly, the D.C. Government was not satisfied that Coastal had the requisite thermoplastic application equipment to do the work. Coastal had offered in evidence letters from the equipment manufacturer which seemingly indicated that Coastal was interested in securing the necessary thermoplastic melting kettles and applicators. In the D.C. Government's view, these letters were not sufficient to establish that Coastal would in fact secure the equipment. The firm also asserts that it indeed had placed an order with the manufacturer, contingent upon receiving the contract, and that a copy of this order was furnished to the D.C. Government. The D.C. Government states that it has no knowledge of receiving any such document. In any event, as before, Coastal has not availed itself of the several opportunities afforded it to obtain whatever documentary evidence was necessary to establish clearly that it would have the equipment to perform the contract.

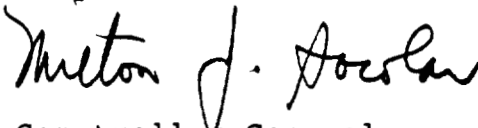
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Accordingly, even though there may have been some error concerning Coastal's lack of prior thermoplastic application experience, we believe the D.C. Government had sufficient other reasonable bases for determining that the firm is not a responsible contractor for this procurement. Cf. Dyneteria, Inc., B-211525, Dec. 7, 1983, 83-2 CPD ¶ 654 (in which we sustained a protest against a negative determination of responsibility where that determination was based upon the unreasonable or unsupported conclusions of a pre-award survey team).

We find nothing objectionable in the D.C. Government's decision to cancel the solicitation now because the original contract performance period will soon expire, and work of this type cannot be done during the winter. We believe the record clearly shows that any delay in proceeding to award resulted from the several opportunities the D.C. Government afforded Coastal to establish its responsibility, and not from any willful intent to deny the firm the contract. Jack Roach Cadillac, Inc., supra.

The protest is denied.

for 
Comptroller General
of the United States